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Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the rights vested in "members" by the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA") extend to persons who at one time were, but no longer are, employed within the union's jurisdiction but who have not been formally "expelled" from membership.

2. If so, whether § 501(b) of the LMRDA to that extent violates Article III of the United States Constitution by conferring authority to sue derivatively, on behalf of a union, upon persons who no longer have a personal stake in the outcome of the suit?

3. Whether a district court is required to issue the "good cause" certification that is prerequisite to maintenance of a § 501(b) action even though the court finds that the suit is not in the interest of the union "for whose benefit" the statute declares the suit is to be brought?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The United Steelworkers of America, AFL-CIO-CLC, hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *Erkins, et al. v. Bryan, et al. and Steelworkers*, No. 80-7559.

The American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), the federation of national and international unions with which USWA is affiliated, supports the request for a writ of certiorari. This petition, which is the joint product of USWA and the AFL-CIO, reflects the identity of their views on the issues presented, and their desire to minimize the burdens on the Court by stating their common position only once.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of Alabama is reported at 494 F. Supp. 732 and is reprinted as Appendix C to this petition. The opinion of the same district court on plaintiffs' motion for reconsideration is reported at 494 F.Supp. 737 and is reprinted as App. D. The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 663 F.2d 1048 and is reprinted as App. A. The opinion of the court of appeals on rehearing is unreported and is reprinted as App. B.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on December 14, 1981. A timely petition for rehearing was filed and was denied on March 19, 1982 (App. B). On June 4, 1982, Justice White signed an order extending the time for filing a petition for a writ of certiorari to and including July 17, 1982 (App. E), and on July 9, 1982, Justice White signed an order further extending the time for filing a petition for a writ of certiorari to and including August 16, 1982 (App. F). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 et seq., provides in pertinent part as follows:

> § 3. *Definitions* [29 U.S.C. § 402]
>
> For the purposes of this chapter—
>
> (o) 'Member' or 'member in good standing,' when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has

been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 501. *Fiduciary responsibility of officers of labor organizations* [29 U.S.C. § 501]

* * * *

(b) When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

STATEMENT OF THE CASE[1]

Plaintiffs (respondents Erkins, Denson, and Culpepper) were employed by the American Buildings Company ("the

[1] This case is before the Court on review of the district court's decision that plaintiffs lacked standing under 29 U.S.C. § 501(b) to prosecute this action. The district court based its decision upon affidavits and exhibits that were submitted by the parties, and the statement of the case that follows is based upon those evidentiary materials. The facts recited herein are undisputed.

Company") at its Eufaula, Alabama plant. Petitioner United Steelworkers of America ("USWA") was the exclusive bargaining representative of the approximately 300 production and maintenance employees at the plant. USWA chartered a local union—Local 7326 ("the Local")—to assist it in performing its duties as the bargaining representative; the employees in the bargaining unit were members of USWA and of Local 7326. The membership of Local 7326 was limited to the employees of the Company's Eufala plant.

On December 3, 1976, upon expiration of its collective bargaining agreement with the Company, USWA commenced a strike against the Company; the strike was authorized by a vote of the membership of Local 7326. The strike continued for over eighteen months, until July 14, 1978, at which time USWA was decertified by the National Labor Relations Board as the bargaining representative for the Company's employees on the basis of an NLRB election among the employees in which a majority voted to no longer be represented by USWA.

Article III of USWA's Constitution limits membership in USWA to persons who are "employed in . . . a[] . . . place within the jurisdiction of the International Union." As a result of the decertification, the employees of the Company ceased to be represented by USWA and automatically ceased being eligible for membership in USWA (and in Local 7326). The employees perforce ceased being obligated to pay dues to USWA and, in fact, ceased paying union dues. USWA did not conduct formal proceedings, however, to expel each individual from the Union.[2]

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[2] In accordance with its standard procedure, USWA did take steps to wind up the affairs of Local 7326. Towards that end, USWA appointed an International representative as administrator of the local. The administrator removed the Local officers from their positions and took control of the Local's assets. Thereafter the Local became dormant.

In December, 1979—seventeen months after USWA was decertified as the bargaining representative for the Company's employees—USWA received a letter from Thomas Jacobson, an attorney who stated he represented a group called the "United Truth Seekers" composed of former employees of the Company. In his letter, Jacobson alleged that during the strike three former officers of the Local and one former member of the Local's negotiating committee had violated their fiduciary duties. Jacobson requested "an accounting of all monies which were in the strike trust fund during the year 1978" [3] and further requested information concerning monies that had been in the Local's own treasury.

In January, 1980, USWA received a second letter from Jacobson on behalf of the "United Truth Seekers." [4] This letter repeated the allegations of the first letter and demanded that USWA file a suit against the alleged wrongdoers to recover "union funds which . . . were misappropriated." The letter further stated that if USWA did not commence such an action within one week, Jacobson's clients intended to do so.

USWA's Associate General Counsel, Carl Frankel, responded to Jacobson's letters. Frankel wrote Jacobson that USWA could not commence an action against the alleged wrongdoers based solely upon the "Truth Seekers'" bald accusations and in the absence of any evidence sup-

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[3] During the course of the strike, USWA, in accordance with its standard procedures, sent monies from its "International Strike and Defense Fund" to the Local. These "strike funds" were placed in a special local strike fund account by the Local and were to be used to aid strikers in need of financial assistance and to pay costs incurred by the Local (or its officers or members) in the conduct of the strike, such as the cost of publicizing the strike or of mounting a boycott of the Company's products. Any assets remaining in the Local's strike fund account at the conclusion of the strike were to be returned to USWA's Strike and Defense Fund.

[4] USWA's response to Jacobson's first letter crossed in the mail with Jacobson's second letter.

porting the allegations. At the same time, Frankel explained to Jacobson that USWA maintains an auditing program to assure that the funds of its local unions are properly managed, and Frankel stated that an audit of Local 7326's affairs would be conducted. Frankel promised that "if our audit turns up any evidence of financial impropriety, or if you should furnish some support for your serious charges of financial wrongdoing, the Union will certainly initiate the appropriate action." [5]

In February, 1980, USWA received another letter from Jacobson. With this letter, Jacobson transmitted an affidavit from Sandra Ward, the wife of the former treasurer of the Local, listing each check that had been written on the Local's strike fund account to the alleged wrongdoers during the month of April, 1978.[6] In his cover letter, Jacobson renewed his demand that USWA initiate suit against the former officers of the Local.

On March 6, 1980, USWA turned the matter (including Jacobson's letters and the Ward affidavit) over to the

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[5] In accordance with the commitments made in Frankel's letter, USWA assigned George Steinbaugh, one of USWA's auditors, to perform an audit of Local 7326. Frankel met with Steinbaugh and instructed him to conduct a full audit of both the local's strike fund account and its general account with a view toward uncovering any improprieties by any former officer of the local.

Frankel later decided that, in light of the seriousness of the charges being made by plaintiffs, it would be preferable to have an outside, public accounting firm conduct the audit. USWA retained the firm of Main, Hurdman & Cranstoun for that purpose. Frankel instructed the firm to follow standard auditing procedures to determine whether each check written to a former Local officer was for a proper or improper purpose.

[6] In her affidavit Ward stated that she had reviewed the cancelled checks for April, 1978 which were sent to her husband by the bank. Ward's affidavit contained no information as to the purposes for which the checks in question were given to the Local officers and thus did not provide a basis for determining whether the checks were issued to reimburse the individuals for legitimate expenses or whether, instead, the checks were issued for improper purposes.

United States Department of Labor ("DOL") for investigation and for any action DOL deemed appropriate (including, if warranted, criminal prosecution of the former officers). USWA pledged its full cooperation to the DOL in its investigation. USWA decided to enlist DOL in the matter for two reasons: first, a DOL investigation would enable an impartial determination of whether wrongdoing had occurred; and second, a DOL investigation would conserve the Union's resources, for if any wrongdoing were found by DOL then USWA would be able to recover all losses under its "Labor Organization Bond" with the United States Fidelity and Guaranty Company. USWA had followed this procedure in at least two prior instances and each time had secured indemnification from the bonding company without the expense of litigation.

On the same day that USWA turned the matter over to DOL, Frankel wrote to Jacobson to inform him of that fact. Frankel again pledged that if any wrongdoing was uncovered "[t]he Union will of course file claims with its bonding company to recover any losses."

On March 21, 1980, Richard Hunsucker, the Acting Director of the Labor-Management Services Administration of DOL, wrote to Frankel acknowledging receipt of the materials Frankel had transmitted. Hunsucker "thank[ed]" Frankel "for bringing this information to our attention" and stated that "the material will be reviewed and appropriate action taken."

On May 1, 1980, while the DOL investigation was pending,[7] plaintiffs commenced this action against the alleged wrongdoers (respondents Bryan, Comer, Greene and Bullard) seeking to recover for the benefit of USWA

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[7] The DOL investigation ended in November, 1981, with the indictment of the former officers of the Local. On February 26, 1982, the defendants were acquitted of all charges following a five-day jury trial.

the money that plaintiffs alleged had been misappropriated. Plaintiffs invoked § 501(b) of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 501(b) ("LMRDA") which, under certain conditions, authorizes a union member to sue derivatively on behalf of his union to recover union assets that have been diverted.

Because a § 501(b) action may be filed only with "leave of the court obtained upon verified application and for good cause shown," plaintiffs filed a verified complaint and an *ex parte* application seeking leave to proceed.[8] Plaintiffs' papers did not inform the Court that USWA had turned the matter over to DOL for an investigation or that USWA had pledged to file a claim on its bond if any wrongdoing was uncovered. Based on the information before it, the district court granted plaintiffs' application on the same day it was filed.

In June, 1980, USWA filed a motion to intervene for the limited purpose of challenging plaintiffs' right to maintain this action. In support of its challenge USWA made two contentions. First, USWA argued that plaintiffs were not entitled to sue derivatively on USWA's or the Local's behalf under § 501(b) because, as a result of the decertification of USWA as the bargaining representative for the Company's employees, plaintiffs, along with all the other employees, were no longer members of USWA (or of Local 7326) and thus no longer had any interest in the union's recovery of monies. Alternatively, USWA argued that there was not "good cause" for the court to entertain the action since the matter had been turned over to the Department of Labor for an impartial determination of whether any wrongdoing had occurred, and, if wrongdoing was found, USWA had pledged to file a claim with its bonding company to recover any misappropriated funds—a less costly (and more certain)

[8] Section 501(b) expressly authorizes the use of *ex parte* applications.

method than plaintiffs' lawsuit for USWA to recover any misappropriated funds.[9]

On June 30, 1980, the district court issued a Memorandum Opinion in which it sustained the first of USWA's contentions.[10] The court began by noting that its earlier order "illustrates . . . the pitfalls of *ex parte* orders, even in those circumstances where Congress by statute has expressly authorized such orders" (App. 14a). Based upon the full adversarial record that had been developed as a result of USWA's participation, the district court found that plaintiffs "were not members of USW[A] when suit was filed" (App. 19a), and concluded that accordingly they could not maintain this action under § 501(b):

> Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union.[11] * * *
>
> The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he

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[9] Under § 501(b), if plaintiffs were to prove misappropriation and obtain a judgment against the former Local officers, and if these former officers were able to pay the judgment, the court could "allot a reasonable part of the recovery . . . to pay the fees of counsel prosecuting the suit . . . and to compensate [the plaintiffs] for any expenses necessarily paid or incurred by [them] in connection with the litigation." Such an award of fees and expenses would, of course, diminish USWA's recovery. In contrast, if USWA recovered on its bond it would obtain repayment for every penny of any misappropriated funds.

[10] Because it found that plaintiffs were not members, the district court did not reach USWA's second argument, and thus left its initial, *ex parte* finding of "good cause" undisturbed.

[11] The concession to which the court referred was made repeatedly during oral argument before the district court. When plaintiffs later denied that they had conceded that they were no longer members of the Union, the district court quoted three such concessions (App. 26a-27a) in its opinion denying plaintiffs' motion for reconsideration.

> has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. . . . A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW[A] will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise. [App. 18a, 20a]

On plaintiffs' appeal, a panel of the United States Court of Appeals for the Eleventh Circuit reversed. That court, in an opinion by Judge Tuttle, concluded that even though, under the USWA Constitution, plaintiffs no longer were eligible for membership in USWA and no longer were represented by USWA, plaintiffs were still "members" within the meaning of § 3(o) of the LMRDA, 29 U.S.C. § 402(o). The court of appeals reached that conclusion by construing § 3(o) to mean that an individual who at one time qualifies for union membership becomes a member for life unless, thereafter, "one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after 'appropriate proceedings' held pursuant to lawful constitution or bylaw provisions" (App. 7a, quoting and following *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980)). Since neither event had occurred with respect to plaintiffs, they were still, in the court's view, "members" entitled to institute a § 501(b) action on USWA's behalf (App. 6a).[12] The

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[12] In its opinion as originally issued, the court of appeals had stated:

> The proof before the [district] court at the time of the hearing was that these petitioners *were still employees*, they had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to under-

court of appeals accepted the district court's finding that plaintiffs had no derivative interest in any recovery by the union but concluded that "[i]t is . . . not necessary that the [plaintiffs] in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members [under § 3(o)], the law says they have the standing to conduct litigation" (*Id.*).

After concluding that plaintiffs were entitled to maintain the action, the appellate court turned to the "good cause" issue. The court accepted, at least *arguendo*, USWA's contention that "the way it handled the matter instead of filing suit . . . would have been more beneficial to the Union than to have acted as requested by the members [*i.e.* to have filed suit]" (*Id.* 9a). The court nonetheless ruled that this "cannot establish a want of good cause" (*id.*), explaining that so long as the union has refused to file suit on demand (and so long as plaintiffs' complaint is not otherwise dismissable on its face), "good cause" exists as a matter of law. (*Id.* 9a-11a).

USWA filed a petition for rehearing and suggestion of rehearing *en banc*, challenging the panel's interpretation of the terms "member" and "good cause" and also arguing that, as construed by the panel, § 501(b) violated Article III of the United States Constitution by conferring standing to sue on persons who, in the panel's own words, did not have "any personal stake in the outcome of the litigation." The court of appeals denied rehearing and rehearing *en banc*.

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stand, therefore, how the International can contend that they were not "members" of the Local at the time the suit was filed. [App. 6a-7a; emphasis added]

On rehearing, the court amended its opinion by deleting the underscored words because the court found that that statement "appears not to be supported by the evidence in the record" (App. 13a). The court did not otherwise modify its opinion.

REASONS FOR GRANTING THE WRIT

This case poses three questions, two statutory and one constitutional, which warrant review by this Court. We demonstrate *infra* at 15-23, that the court below resolved the two statutory questions—concerning the meaning of the terms "member" and "good cause"—contrary to congressional intent; that the court resolved the Article III question in a manner that contravenes the decisions of this Court interpreting that Article; and that viewed simply as questions of law, these three issues merit this Court's attention. Before doing so, however, we first describe the immense practical consequences of the decision below for labor unions and for the federal courts.[13]

I. IMPORTANCE OF THE ISSUES PRESENTED

A. Virtually every industrial union limits its membership to those who are employed within the union's jurisdiction, *i.e.*, in a workplace that the union represents. Only persons employed in such a workplace are eligible to *join* the union, and eligibility to *remain* a member ceases when that employment ends. Because of the high rate of turnover within workforces, the distressingly large number of permanent plant closings in the current economic climate, and the less-frequent (but not uncommon) decertification of unions, vast numbers of workers move into and then out of the jurisdiction of such unions.

Under the decision below, an individual's membership in a union does not terminate when his employment within the union's jurisdiction terminates, even though the union's constitution so provides. This means that virtually every industrial union still has as "members" vast numbers of persons who are no longer employed within the union's jurisdiction and are no longer represented by the union; for the USWA alone, there are literally hundreds of thousands of such individuals. If

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[13] It is these consequences that have prompted the AFL-CIO to join in this petition.

these individuals are "members" for purposes of the LMRDA, they have the right not only to bring derivative actions on the union's behalf under § 501(b), but, more importantly, to attend union meetings, vote in union elections, and run for union office (*see* §§ 101(a), 401(e), 29 U.S.C. §§ 411(a), 481(e)). Indeed, in three other, recent cases involving the meaning of the term "member" under the LMRDA, individuals who had left the jurisdiction of a union sought to exercise precisely these rights, and in two of the cases the Seventh Circuit held that the individuals were entitled to do so.[14]

The only recourse that the decision below, and the like decisions of the Seventh Circuit, contemplate for a union wishing to exclude from participation in its internal decision-making processes persons no longer employed within the union's jurisdiction is, in the words of the court below, to institute "proceedings . . . looking towards the[] expulsion" from membership of each such individual (App. 9a). Presumably, such proceedings must comport with the requirements of § 101(a)(5) of the LMRDA which states that "no member of any labor organization may be expelled . . . unless such member has been (A) served with written specific charges, (B) given a reasonable time to prepare his defense; (C) "afforded a full and fair hearing."[15] Unions thus would be compelled to

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[14] *Alvey v. General Electric Co.*, 622 F.2d 1279, 1284 (7th Cir. 1980) (individuals laid off from their jobs and no longer paying union dues entitled to vote in a union election); *Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 216-17 (7th Cir. 1974) (discharged employee held entitled to run for president of union composed exclusively of workers at the plant from which the employee had been discharged). *Contra*, *Taylor v. Great Lakes Seamen's Union*, No. 80-1307 (N.D. Ohio. 1981) (employee who quit his employment held not entitled to vote in union election).

[15] In *Brennan v. Independent Lift Truck Builders Union*, *supra*, 490 F.2d at 217 n.6, the court held that the provision in § 3(o) of the LMRDA that membership may be terminated by expulsion "after appropriate proceedings consistent with lawful provisions of

devote substantial time and resources conducting a massive volume of never-ending proceedings to "expel" from the union persons whose "offense" is simply that they are no longer employed within the union's jurisdiction.

B. The construction given by the court below to the term "good cause" in § 501(b) likewise will have profound practical consequences for unions, and for the federal courts as well. The decision below virtually guarantees that litigation will proceed whenever there is reason to believe a union official has violated his fiduciary duties. For under the decision below, if the union itself does not file a lawsuit in such circumstances, the doors of the federal courts automatically are open to any individual union member to sue in the union's stead—even when the union is pursuing a method of recouping its losses that the court agrees is more efficacious than litigation. For unions, the decision below means that if union funds are misappropriated a union will be unlikely to recover the entire amount of its losses, because in a § 501(b) action—as opposed to, *e.g.*, a proceeding on the surety bond which every union must secure to cover each union official who handles union funds, 29 U.S.C. § 502—the recovery for the union can be diminished by an award of costs and fees to the plaintiff's attorneys. And for the federal courts, the decision below means that their already-overloaded dockets will be burdened by unnecessary § 501(b) actions that disserve the very purpose (protection of union treasuries) for which that section was enacted.

Of course if Congress intended these results, there would be neither cause nor a basis for this Court to intervene. But as we now show, Congress did not so intend, and therefore this Court should grant a writ of certiorari to review the decision below.

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the constitution and bylaws of the union" requires that expulsion procedures comply with § 101(a)(5). This holding was cited with approval in *Alvey v. General Electric*, *supra*, 662 F.2d at 1284, in a passage which the court below quoted and relied upon (App. 7a-8a).

II. INCORRECTNESS OF THE DECISION BELOW ON THE ISSUES PRESENTED

A. The Meaning of the Term "Member"

Section 3(o) of the LMRDA, 29 U.S.C. § 402(o), defines "member" as:

> any person [1] who has fulfilled the requirements for membership in [a labor] organization, and [2] who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings.

The court below based its decision on what it termed "the precise language" of this section (App. 7a). The court read that language temporally, to mean that if a person at any time in history "has fulfilled the requirements for membership" in a union that person becomes a member of the union for life, subject only to two conditions subsequent (withdrawal or expulsion/suspension).[16] But this is by no means the only possible reading of the words of § 3(o); it is at least equally possible to read the two clauses of the section to operate simultaneously, so as to provide that to be a union member at a particular point in time one must (1) have fulfilled the requirements for union membership (such as working within the union's jurisdiction or the union's trade) and (2) not have withdrawn or been expelled or suspended from the union. Under this latter reading of § 3(o), the first clause would allow a union to define the class of persons who, at any particular point in time, are eligible for membership in the union, and the second clause would exclude from membership certain persons who fall within that class but who have elected not to be a member or whose membership has been terminated or suspended by

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[16] By the same reading, § 3(o) would provide that once an individual has been "suspended from membership" he forever ceases to be a member, even after the suspension ends. At least one lower court has rejected such a reading as contrary to common sense. *Axelrod v. Stolts*, 264 F.Supp. 536, 540 (E.D. Pa. 1967), *aff'd*, 391 F.2d 549 (3rd Cir. 1968).

the union (following "appropriate proceedings") for other reasons.

While the words of § 3(o) may be susceptible of more than one interpretation, the legislative intent—which is, after all, controlling [17]—is not: Congress intended to preserve, rather than nullify, the right of unions to prescribe and enforce eligibility requirements for obtaining *and retaining* union membership. Congress thus did not intend to confer lifetime membership status, absent "expulsion" proceedings, upon those who were once, but are no longer, employed within the union's jurisdiction.

In the Labor-Management Relations Act of 1947, enacted twelve years before the LMRDA, Congress had expressly guaranteed "the right of a labor organization to prescribe its own rules with respect to the acquisition *and retention* of membership therein." 29 U.S.C. § 158(b)(1)(A). The debates over the LMRDA, which

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[17] As this Court has repeatedly cautioned, most recently last Term in *Steelworkers v. Sadlowski*, 50 U.S.L.W. 4626, 4629 (1982), in interpreting the LMRDA:

> [w]e must look to the objectives Congress sought to achieve, and avoid 'placing great emphasis upon close construction of the words.' *Wirtz v. Local 153, Glass Bottle Blowers Ass'n*, 389 U.S. 463, 468 & n.6 (1968) (*quoting* Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 852 (1960); *Hall v. Cole*, 412 U.S. 1, 11 & n.17 (1973)).

One reason the Court has given for this approach to the LMRDA is that " 'much of the bill was written on the floor of the Senate or House of Representatives' " *Bottle Blowers*, *supra*, 389 U.S. at 468 n.6 and *Hall*, *supra*, 412 U.S. at 11 n.17, *quoting* Cox, *supra*. This is true of § 3(o) which was added to the Senate bill as part of Senator McClellan's amendment by which all of Title I was added to the bill, 2 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, at 1102 (hereinafter cited as "—— Leg. Hist. ——"), and was altered on the floor of the House by the Landrum-Griffin bill which was adopted as a substitute for the entire bill which had been reported out by the House Committee, *id.* at 1045.

in relevant part took place after § 3(o) had been added to the bill, show that—in the words of Representative Landrum, one of the two co-sponsors of the Landrum-Griffin bill that became the LMRDA—Congress did

> not here seek to repeal that. We do not here withdraw or take away from the unions the right to fix their own rules for the acquisition or *retention* of membership. [2 Leg. Hist. 1649; emphasis added]

Representative Griffin, the other co-sponsor of the bill, confirmed that understanding:

> The labor reform legislation . . . does not touch or deal in any way the admission to, or *retention* of, membership in a union. [*Ibid.*; emphasis added][18]

No Senator or Representative expressed a contrary intent, or contrary understanding of the import of § 3(o).

Plainly, then, " 'Congress did not intend section 2(o) to limit the previously recognized right of unions to choose their members,' " *Parish v. Legion*, 450 F.2d 821, 824 (9th Cir. 1971). Accordingly § 3(o) should not be read "wooden[ly]," as the court below did, to define membership "in terms of a given point in time," *Taylor v. Great Lakes Seamen's Union*, No. 80-1307 (N.D. Ohio 1981), and thereby to deny unions the right to treat

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[18] Indeed, so determined was Congress not to intrude upon union autonomy in this area that it even rejected proposals to prohibit racial discrimination by unions in determining their members. Such a proposal was made to the Senate Committee on Labor and Public Welfare by, e.g., Professor Archibald Cox, one of the committee's chief advisors, and by the American Civil Liberties Union; *see* Hearings on Union Financial and Administrative Practices and Procedures, 85th Cong., 2d Sess. 363, 1118 (1958); the Committee, however, did not incorporate this suggestion in the bill it reported out, S.1555, 1 Leg. Hist. 338-96. On the floor of the House, Rep. Adam Clayton Powell introduced an amendment to the Landrum-Griffin bill to prohibit unions from discriminating on grounds of race, religion, color, sex, or national origin in admitting or expelling members, 2 *id.* 1648; the amendment was defeated, 2 *id.* 1651.

those who have left their jurisdictions as no longer members. Rather, the correct interpretation of § 3(o) is the second interpretation set forth above: "as an ongoing condition a Plaintiff must show that he has fulfilled the requirements for membership in such organization." *Id.* The contrary holding of the court below contravenes congressional intent.[19]

This conclusion is confirmed—and the error of the decision below further exposed—by an examination of § 101(a)(5) of the Act. That section governs the procedures that unions must follow in "expel[ling]" members; it would be directly applicable if the court below were correct in its conclusion that the only way a union can remove from "member" status those no longer within its jurisdiction is to "expel" them. Yet it is apparent from the face of § 101(a)(5) that Congress did not intend to require unions to resort to expulsion when an individual leaves the jurisdiction of the union. Rather, § 101(a)(5) was enacted on the understanding that expulsion was a means used only for disciplining for misdeeds those who continued to be within the union's jurisdiction: § 101(a)(5) is entitled "Safeguards against improper disciplinary action"; it applies to proceedings to "fine[], suspend[], expel[], or otherwise discipline[] union members"; and the procedures it requires—for example, notice of "written specific charges" and "a reasonable time to prepare [a] defense"—make sense only in the context of disciplinary proceedings involving those

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[19] The decision below is likewise inconsistent with the philosophy animating the entirety of the LMRDA. As expressed by the Senate Labor and Public Welfare Committee, the Congress that enacted the LMRDA believed that "great care should be taken not to undermine union self-government." 1 *Leg. Hist.* 403. Accordingly, Congress eschewed any regulation which it believed "would weaken rather than strengthen the labor movement" or which "would cross over into the area of trade union licensing and destroy union independence." *Ibid.*

who otherwise qualify for continued union membership.[20] Thus, § 101(a)(5) further demonstrates that, contrary to the decision below, Congress did not intend to require unions to resort to expulsion proceedings merely to terminate the membership status of individuals who have ceased to be employed within a union's jurisdiction.

B. The Article III Issue

The decision below, by conferring LMRDA membership status—and hence statutory authority to sue derivatively on a union's behalf—on persons, such as plaintiffs, who are no longer within the union's jurisdiction (but have not been formally "expelled" from the union), places the LMRDA in conflict with Article III of the Constitution. The appellate court acknowledged that such persons do not have "any personal stake in the outcome of the litigation," but deemed that of no consequence, reasoning that under the LMRDA "[i]t is . . . not necessary" that plaintiffs have such a "personal stake." Under Article III, however, it *is* necessary for litigants to have a "personal stake in the outcome of the litigation"; indeed, the Article III "standing question" is precisely "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal court jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (emphasis in original); *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 38 (1976). As this Court put it just last Term in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 50 U.S.L.W. 4103, 4105 (1982) (citations omitted):

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[20] The legislative history of § 101(a)(5) also shows that the section was intended, in the words of Senator McClellan, the author of the amendment that added all of Title I (including § 101(a)(5)) to the bill, "to protect a man from being arbitrarily disciplined without a fair hearing" 2 Leg. Hist. at 1103; *see also id.* at 1104 (Sen. McClellan); *id.* at 1232 (Sen. Kuchel); *id.* at 1566 (Rep. Griffin).

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' • • •
>
> 'The requirement that a party seeking review must allege facts showing that he is himself adversely affected . . . serve[s] as at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have a direct stake in the outcome.' [21]

This "requirement states a limitation on judicial power." *Id.* at 4106.

> Those who do not possess Art. III standing may not litigate as suitors in the Courts of the United States. Art. III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the 'merits' of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the framers of the Constitution at Philadelphia in 1787. . . . [*Id.*]

The decision below, by allowing persons without a "personal stake in the outcome" to bring § 501(b) actions, thus ignores Article III's "limitation on judicial power."

C. The "Good Cause" Issue

Section 501(b) requires a union member wishing to bring an action under that section to obtain "leave of the court . . . for good cause shown." This prerequisite is, as the Second Circuit has observed, "an unusual one"; "[o]rdinarily one needs no permission to litigate under a federal statute." *Dinko v. Wall*, 531 F.2d 68, 74 (2d

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[21] *See also, e.g., Blum v. Yaretsky*, 50 U.S.L.W. 4859, 4[illegible] (1982).

Cir. 1976). The courts have "wrestle[d] inconclusively with the problem of defining good cause." *Id.*

In the instant case, the court below held that even if the union on whose behalf the proposed suit is to be brought is already pursuing the relief that is the object of the proposed suit in a "way more beneficial to the Union" than litigation, the district court is without power to preclude the litigation on the ground that there is not "good cause" for its prosecution. This holding is contrary to congressional intent, and conflicts, in principle, with decisions of other courts of appeals.

1. Section 501(b) expressly declares that actions under this section are to be "for the benefit of the labor organization" to which the plaintiff-member belongs. Given this congressional purpose, it is axiomatic that in determining whether "good cause" exists for a § 501(b) suit, a court must consider whether the proposed action would, if successful, redound to the benefit of the union. Yet the court below precluded that very inquiry, thereby depriving the district court of the power to withhold permission to sue for want of "good cause" even where the court determines that the union is pursuing a more efficacious means than litigation to recover misappropriated funds.

The court justified its conclusion as follows:

> [T]he language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. [App. 9a-10a]

But "the text" of § 501(b) does not "lay down" only *one* precondition to the filing of an action under the section, as the court below seemed to believe; it lays down two, independent, preconditions. The first sentence of § 501(b)

states that an action may be filed only if the union "refuse[s] or fail[s] to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by a[] member of the labor organization." The second sentence adds a second prerequisite: "No such proceeding shall be brought except upon leave of the court . . . *for good cause shown.*" In adding this second prerequisite "Congress must have intended more than that a union member has requested the union to sue and the union has failed to do so." *Dinko v. Wall, supra*, 531 F.2d at 74.

Thus, it is the court below that was guilty of "second guess[ing] the purpose of the statute" by collapsing the two discrete preconditions to a filing of a § 501(b) action into one.[22] And in so doing the court reached a result which is the antithesis of § 501(b)'s purpose: the court authorized § 501(b) actions that actually will drain union resources by reducing (by the amount of the plaintiff's attorneys' fees and costs) the recovery that the union would otherwise receive from the simple alternative—which USWA was pursuing here—of seeking recovery under its fidelity bond.

2. The decision below is inconsistent, in principle, with the decision of the Third Circuit in *Purcell v. Keane*, 406 F.2d 1195 (3rd Cir. 1969). In that case the question was whether, before filing a § 501(b) action, a would-be-plaintiff was required to pursue the alleged wrongdoers through internal union procedures. The court held that such exhaustion of internal union remedies is not an ab-

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[22] Even if the "demand and refusal" prerequisite *were* the only prerequisite to the filing of a § 501(b) action, it would be far from clear that plaintiffs had satisfied it. The statutory language setting forth that prerequisite is in the disjunctive: the union must fail "to sue *or* recover damages *or* secure an accounting *or other appropriate relief*." A number of courts have concluded, however, that Congress actually intended this prerequisite to be met whenever a union fails "to sue [to] recover damages. . . ." *See Dinko v. Wall, supra*, 531 F.2d at 72 & n.4 & cases cited.

solute prerequisite to the filing of a § 501(b) action in every instance, noting that no such absolute requirement is set forth in the statute. But the Third Circuit went on to hold that the failure to exhaust internal union remedies "may affect the 'good cause' requirement," since "[a] court, in its discretion, may . . . take *all* the facts and circumstances into consideration in determining whether 'good cause' has been shown." *Id.* at 1200 (emphasis added).[28] *See also Dinko v. Wall*, *supra*, 531 F.2d at 75 ("'good cause' is an elastic concept"). In contrast, the court below held that certain facts—specifically, the union's pursuit of an alternative to litigation which may be "more beneficial to the Union"—may *not* be taken into consideration in determining whether good cause exists. Thus the decision below cannot be squared with the interpretation of "good cause" announced in *Purcell*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[28] In *Purcell*, the court found that good cause existed, noting that "the subcommittee appointed [by the union] to investigate the charges . . . was composed of the same individuals who were charged with the misuse of funds." 406 F.2d at 1200.

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

Dec. 14, 1981

Appeal from the United States District Court
for the Middle District of Alabama

Before TUTTLE, HENDERSON and HATCHETT, Circuit Judges.

TUTTLE, Circuit Judge:

By this appeal we are required to construe and apply the provisions of the Landrum-Griffin Act, particularly 29 U.S.C. § 501(b) when persons alleging themselves to be members of a local union seek permission of a United States district court to file an action against former officers of the local alleging misappropriation of union funds, in which action the prospective plaintiffs seek to make a recovery for the benefit of the union.

This section provides:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have

violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

29 U.S.C. § 501(b).

The petitioners, here the appellants, filed their petition with the district court seeking permission to file their suit as members of Local 7326 of the International Union, United Steel Workers, alleging that several former officers had, during a strike in which the petitioners had participated, embezzled and misappropriated money furnished to the Union by the International for strike benefits. The petition alleged that the petitioners were, at the time, members of Local 7326. They alleged sufficient facts which would have supported a complaint alleging misapplication of funds as outlined in § 501(b). They also alleged that they had "made demand by letter to United Steel Workers of America [their international union] to take the necessary action to prevent any further union funds from being misused by defendants for the above-

mentioned purposes, and to take immediate steps, by filing court action, to recover from the individual defendants the funds the defendants have wrongfully expended." They alleged the officers of the International had failed under a reasonable time to take such action. Based on such application, sworn to by the parties and presented to the court ex parte as is permitted under the statute, the trial court entered its order granting leave to file the petitioners' complaint.

Thereafter, after granting leave to the named respondents to delay the filing of their response, the trial court set down for a hearing a motion by United Steel Workers of America for permission to intervene for the purpose of moving the court to revoke its order permitting the filing of petitioners' complaint. This motion to intervene was supported by a long affidavit by the associate general counsel of the United Steel Workers of America, who outlined the usual procedures for the handling of the affairs of locals which are in similar circumstances to Local No. 7326. Neither the petition to intervene nor the Frankel affidavit categorically stated that the petitioners were no longer "members" of the union. This affidavit was extensively answered by counsel for petitioners prior to the hearing conducted by the trial court. The court did not enter an order allowing the intervention, but considered the pleading and affidavit as though it had done so.

The historical facts necessary for us to consider the correctness of the trial court's order revoking its original grant of permission to the petitioners to file their complaint are not in dispute. The membership of Local 7326 consisted entirely of production and maintenance employees employed by American Buildings Company in Eufaula, Alabama. As of January 1, 1978 there were approximately 300 workers employed in the plant. There was a similar number of members of the Local in December of 1976, at the time of the expiration of the most

recent collective bargaining agreement between the Local and the Company. Following the expiration of that agreement, USW commenced a strike against the Company over the terms of a proposed new agreement. The strike was authorized by a vote of the membership of Local 7326. It proved to be a long, bitterly contested struggle which was lost in the end by the Union. In support of the strike the AFL-CIO declared a boycott of the Company's products. The Local lost the right to represent the Company's employees following its defeat in a National Labor Relations Board decertification election conducted on May 18, 1978. This election became final by the Board's certification of the results of the election on July 14, 1978.

Local 7326 did not serve as collective bargaining representative for employees of any other employer than American Building Company. Thereupon, by letter dated July 14, 1978, the director of the district of USW in which Local 7326 was located requested that an administrator be appointed for Local 7326. This was apparently done under the provisions of Article IX of International's constitution which provides "in the event the International president shall have reason to believe any local union is failing to comply with any provision of the constitution, or that action may be required for one of the purposes specified in the following paragraph, the International president may, unilaterally or at the request of officers or members of the local union, institute proceedings . . . which may after appropriate hearings result in suspending or revoking the charter of any such local union." Included as one of the purposes mentioned above for which such action can be taken is "otherwise carrying out the legitimate objects of the International union or such local." Presumably, in the opinion of the district director, such administrator was to be appointed because, in the language of the general counsel's affidavit: "This is the usual *first step* in a procedure followed in cases

where locals have ceased to represent any employees." [Emphasis added.]

Following this appointment, the parties apparently agree that Local 7326 has been dormant; no dues have been paid and no meetings have been held. There apparently have been no collective bargaining or other union activities. Petitioners are still employees of American Buildings Company.

The International contends that under these circumstances, the petitioners were no longer "members" of the Union. Petitioners, on the other hand, contend that until the charter has been revoked, the administrator has completed his audit and the funds have been properly disbursed, they are still members of the Local and of the International. They further contend that even if they were not technically "members" at the time the suit was filed, they nevertheless should be treated as "members-in-substance" and be permitted to file the complaint as members.

Although the petitioners, in their opposition to the trial court's reconsideration of its order granting permission to file the complaint, included a paragraph quoting from the Landrum-Griffin Act section under "definitions" dealing with "members," the trial court did not mention this definition in its disposition of the case. It held in effect, that the decertification brought about the dormancy of the Local which resulted in the loss of membership by all of its previous members, including the petitioners. It held that since they were not technically members they were not qualified under the statute to file such a complaint. The court bolstered its determination of this issue by equating the status of a "member" under § 502 with that of a former stockholder in a derivate suit, citing in support of this theory, *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). This Court has held that a former stockholder is not qualified to bring an action on behalf of his corporation under Fed.

R.Civ.Proc. 23.1. *Schilling v. Belcher*, 582 F.2d 995 (5th Cir. 1978), where we stated: "Only a shareholder, by virtue of his 'proprietary interest in the corporate enterprise,'" *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321, 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "'step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own.'"

The difficulty with this reasoning is that this statute makes a "member" of the union a statutory representative "to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization." 29 U.S.C. § 501(b). It is thus not necessary that the petitioners in such an action as this have any personal stake in the outcome of the litigation. If the petitioners are members, the law says they have the standing to conduct litigation.

Moreover, it is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part. This definition section is found at 29 U.S.C. § 402, in which it is stated:

> For the purposes of this chapter . . . ¶ O "member" or "member in good standing," when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the Constitution and bylaws of such organization.

The proof before the court at the time of the hearing was that these petitioners were still employees, they had not voluntarily withdrawn from membership and they had not been expelled or suspended from membership. It is difficult to understand, therefore, how the International can contend that they were not "members" of the

Local at the time the suit was filed. When it was creating a new right in "members" of a union, it was surely within the power of Congress to say "for the purposes of this Chapter we now say who is a member." This is the precise language of the statute.

The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:

> As is apparent from the choice of terms, Congress did not limit the protections of the Landrum-Griffin Act to those whom the union recognizes as members. Rather, one who has fulfilled the membership requirements, that is, one who is a member in substance, is protected. *Hughes v. Local 11, International Association of Bridge, Structural & Ornamental Ironworkers*, 287 F.2d 810, 814 (3d Cir.), *cert. denied*, 368 U.S. 829, 82 S.Ct. 51, 7 L.Ed.2d 32 (1961). There is little dispute that the laid-off employees satisfied the union's membership requirements. There is also little dispute that the laid-off employees were not members in good standing because they had not paid dues since their layoff. But under section 402(c), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to lawful constitutional or bylaw provisions. *See Brennan v. Independent Lift Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). Neither of these events occurred here; the union simply classified the laid-off employees as being no longer in good standing. Since laid-off employees did not voluntarily withdraw and the union did not expel or suspend them, they are "members" and therefore protected by the equal rights guarantee of section 411,

subject to the union's reasonable rules and regulations.

Alvey v. General Elec. Co., 622 F.2d 1279, 1284 (7th Cir. 1980).

We recognize that a particular union may have internal rules of membership, but these cannot limit the definition of "member" as contained in the statute that creates a cause of action by a "member." *See Hughes v. Local 11, etc.*, 287 F.2d 810, 817 (3d Cir. 1960). In any event, there is nothing in the constitution[1] of the International that is inconsistent with the definition of "member" in the statute. The assistant general counsel's affidavit, as quoted above, simply states that the administrator, William Caldwell, "took over the affairs of the local upon his appointment. This is the usual first step in the procedure followed in cases where locals have ceased to represent any employees." Article IX provides that when an administrator is appointed for a local union, he

> shall have the right to demand and receive in the name of the International union, and the local union officers shall have the obligation to turn over, the charter and all books, records, monies, assets and property of the local union, *to be held in trust for the local union* and to be used and expended only in the proper conduct of *its* affairs. The administrator shall have the right to replace officers, grievants or other committee members or stewards removed by the International executive board or the administrator, by appointing temporary officers, grievants or other committee members or stewards. [Emphasis added.]

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[1] Parts of the constitution were quoted in affidavits of the International. Petitioner moved this Court to supplement the record by receiving the entire constitution in evidence. This was not objected to by the International. We, therefore, grant that motion.

Thus, it is plain that the appointment of an administrator does not in and of itself terminate the Local. Since the Local cannot exist without members, it seems clear even under the constitution, that the persons who are in good standing upon the date of the appointment of the administrator continue to be members unless they are subsequently suspended or expelled or elect to "voluntarily withdraw."

The record is silent as to what activities the administrator engaged in during the 18 months between the time he took charge and the filing of the petition now before the Court. It is clear, however, that the charter had not been surrendered or canceled by the International, no proceedings had been started against any members looking towards their expulsion and none of them had voluntarily withdrawn from membership. The record discloses that there was some $2,000 in the treasury of the Local at the time the administrator was appointed and the record is not at all clear that pending the final winding up of the Local's affairs these funds belonged to the International as distinguished from the Local for whom, under the language quoted above, they were "to be held in trust . . . and to be used and expended only in the proper conduct of its affairs."

The International further claims, however, that an ingredient in the trial court's decision granting such a petition is that there must be a finding that there had been a showing of "good cause." The International contends that the way it handled the matter instead of filing suit as outlined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not

second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. The trial court found that this precondition had been satisfied.

In its motion to the trial court to vacate its original order, the International stated that one of its purposes was to "enable the Court to consider the matter of plaintiff's compliance with the jurisdictional prerequisites to this action and the question of 'good cause' under 29 U.S.C. § 501(b) on the basis of a full record." Upon the trial court's reconsideration, responding to such motion, the court did not withdraw or modify its earlier determination that the preconditions other than that of membership had been satisfied. It held only that the membership requirement had not been satisfied and made this the basis of its withdrawal of its earlier order.

Whatever may ordinarily be the requirement of the section as to the establishment of good cause, we are satisfied that it was adequately established in this case, once we have determined that these petitioners were members as contemplated by the Act. *See, e.g., Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) and *Dinko v. Wall*, 531 F.2d 68 (2d Cir. 1976), which comments on *Horner v. Ferron* as the "most extensive treatment of good cause" to be found. Rather than accepting the standard of *Dinko* that the good cause requirement in § 501(b) means "that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence," we associate ourselves with the standard of the Court of Appeals for the Ninth Circuit as announced in *Horner, supra*. There, the Court said:

> Thus if the defendant can establish by undisputed affidavit, facts which demonstrate that the plaintiff is not a member of the defendant union, or that the action is outlawed by a statute of limitations, or

that the action cannot succeed because of the application of the principles *res judicata* or collateral estoppel, or that plaintiff has not complied with some controlling condition precedent to the bringing of such a suit, then although these defects do not appear on the face of the complaint, they may warrant denial of the application.

However, we think it inappropriate to consider, at such a hearing, defenses which require the resolution of complex questions of law going to the substance of the case. Defenses of this kind should be appraised only on motion for summary judgment or after a trial. Defenses which necessitate the determination of a genuine issue of material fact, being beyond the scope of summary judgment procedure, are *a fortiori*, beyond the scope of a proceeding to determine whether a section 501(b) complaint may be filed. Defenses involving disputed questions of fact should be appraised only after a trial at which the parties and the court can have the benefit of a complete inquiry, assisted by such pre-trial discovery as may be undertaken. [Footnotes omitted.]

362 F.2d at 229.

Under such a standard, we conclude that good cause was shown in this case.

Upon the filing of the motion by the law firm of Cooper, Mitch and Crawford, for a delay within which to plead to the original complaint, the petitioners filed their motion "to disqualify the law firm of Cooper, Mitch and Crawford and any and all individual attorneys therein from providing legal service of any nature to the named defendants herein." The motion also sought an order "enjoining the United Steel Workers of America from engaging legal counsel or retaining legal counsel on behalf of the individual defendants herein." The grounds for the alleged disqualification were the assertions by the

petitioners that the said law firm had represented the Local in proceedings before the National Labor Relations Board prior to the decertification order and that the International should be enjoined from otherwise providing counsel because of a conflict of interest, pursuant to the Labor Management Reporting and Disclosure Act of 1959. The trial court did not pass on these motions. They remain to be dealt with upon remand.

The trial court's order of June 30, 1980, 494 F.Supp. 732, withdrawing the leave to file a complaint previously granted on May 1, 1980 is REVERSED and the case is REMANDED to the district court for further proceedings not inconsistent with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 80-7559

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,
Plaintiffs-Appellants,

v.

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD and CHARLIE GREENE,
Defendants-Appellees,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Intervenor-Appellee.

March 19, 1982

On Petition for Rehearing, 663 F.2d 1048, and Suggestion for Rehearing En Banc; Truman M. Hobbs, Judge.

Before TUTTLE, HENDERSON, and HATCHETT, Circuit Judges.

PER CURIAM:

The statement contained in the opinions that "petitioners are still employees of American Building Company," appears not to be supported by the evidence in the record. It is therefore stricken from the opinion.

The Petition for Rehearing is DENIED.

No member of this panel or Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Eleventh Circuit Rule 25), the suggestion for Rehearing En Banc is DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
M. D. ALABAMA, N. D.

Civ. A. No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON, and PERRY CULPEPPER,
Plaintiffs,

v.

BILLY BRYAN, and ARTHUR COMER, and GEORGE BULLARD, and CHARLIE GREENE,
Defendants.

June 30, 1980

ORDER

HOBBS, District Judge.

This case illustrates again the pitfalls of *ex parte* orders; even in those circumstances where Congress by statute has expressly authorized such orders.

The plaintiffs in accordance with Section 501(b) of the Labor Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 501(b)) petitioned this Court for leave to file a complaint against certain officers of Local Union No. 7326 of United Steelworkers of America who allegedly took union funds and expended them for unauthorized and improper purposes including purchases for the personal benefit of said officers. Plaintiffs by this complaint seek to compel the officers of the local union to account for all expenditures made by them out of union funds and to require the defendant union officials

to reimburse Local 7326 and USW for all improper expenditures of union funds made or authorized by them.[1]

Section 501(b) provides as follows:

> When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United

---

[1] USW was granted the right to be heard on its plea for reconsideration of the *ex parte* order of this Court in granting plaintiffs the right to file their complaint for the benefit of USW against officers of Local Union No. 7326. Plaintiffs challenge the right of USW to "intervene" in this proceeding by way of urging such reconsideration, because Rule 24(c) requires that a motion "to intervene be accompanied by a pleading setting forth the claim or defense for which the intervention is sought." Plaintiffs correctly argue that USW has no intention of filing a pleading setting forth a claim or defense. But USW has filed a Motion to Vacate Leave to File a Complaint with accompanying memorandum and affidavits. The Federal Rules of Civil Procedure were not written with the almost unique situation in mind in which a plaintiff must obtain permission of court in order to file a complaint. In the instant proceeding, USW does not desire to join issue on the complaint. It simply desires to question the jurisdiction of this Court under § 501(b) of Title 29 to allow this suit to be brought by these plaintiffs for the benefit of USW.

Although the Court is of the opinion that USW has a right to ask for such reconsideration, if the plaintiffs lack standing to bring this suit, the Court could and should on its own motion, re-examine a ruling where the Court has the independent obligation under § 501(b) to determine prior to the commencement of the suit whether the conditions precedent to bringing the suit have been met. This Court, therefore, does consider the oral arguments advanced by the plaintiffs and counsel for USW as well as the memoranda and affidavits filed by them in determining whether its original order was proper.

> States or in any State court of competent jurisdiction to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made ex parte. The trial judge may allot a reasonable part of the recovery in any action under this subsection to pay the fees of counsel prosecuting the suit at the instance of the member of the labor organization and to compensate such member for any expenses necessarily paid or incurred by him in connection with the litigation.

The purpose of allowing suit by union members is "to further union democracy and thereby prevent misuse of power of union leaders." *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968). The suit is for the benefit of the union, not its individual members or the named plaintiffs. As is clear from its reading, § 501(b) imposed certain conditions precedent to suit.

First, a demand must be made on the union to bring an action to recover the allegedly misappropriated funds. Plaintiffs made such a demand.

Second, the labor organization must refuse or fail to sue to recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so. The union in this case has failed to sue although it was provided with a letter in mid-December, 1979, requesting an accounting and alleging misappropriation of union funds by officers of Local Union No. 7326. A representative of USW responded to this letter by requesting the basis for the charges against officials of the Local union. In February 1980, plaintiffs sent an affidavit to USW which contained information suggesting that union funds were misappropriated by local officials. A series of letters were exchanged between the attorney for the plaintiffs and a representative of

USW. On March 6, 1980, the representative of USW wrote the plaintiffs' attorney stating that USW had determined to turn the matter over to the United States Department of Labor for investigation of the charges against the Local officers.

USW contends that its action in turning this matter over to the Department of Labor was reasonable and in no way manifests a decision on its part not to pursue the alleged wrongdoers. Although USW's election may be logical and in the best interest of the union, it does not obviate the fact that the union has refused to bring suit after a demand of several months standing. This Court, therefore, finds that the second condition precedent to suit has been met.

The third condition precedent to bringing suit is that the plaintiff be a "member" of the union. The complaint alleges that plaintiffs "were at all times material hereto members in good standing" of Local 7326 of USW. Without question, plaintiffs were members of the union for purposes of § 501(b) during the time of the alleged misappropriation of funds. The USW points out, however, that plaintiffs are not now, and were not at the time suit was filed, members of the union.

Local 7236 went on strike against the only employer employing any of its members in December, 1976. The strike was long and bitter, ending in failure in May, 1978. Thereafter, USW lost the right to represent the company's employees following its defeat in a National Labor Relations Board decertification election conducted in May, 1978. The Board overruled USW objections to the decertification election on July 14, 1978.

Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit.

No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

During the strike, USW placed money in a special strike fund for the use of Local 7326 to cover expenses of the strike and to aid members through the economic hardship of the strike. The Local was responsible for the distribution of these funds, and it is with respect to these funds that plaintiffs charge misappropriation by officers of Local 7326. Pursuant to agreement between USW and its locals, any funds remaining in local strike funds after conclusion of strikes are returned to USW.

All dues paid by members of the USW are the property of USW rather than the local, and in the event of the revocation of a local union's charter or if a local union disbands, all assets of the local are returned to USW. Article IX, Sec. 4, of USW Constitution.

Finally, Article XI, Section 7 of the USW Constitution, provides:

> A member whose membership is terminated shall have no right or interest in any property of the Local Union or of the International Union, including any dues, assessments or other financial obligations paid by such member in advance of the effective date of such termination.

Plaintiffs concede that since they are no longer union members they have no derivative interest in any recovery effected by them on behalf of the union. They insist, however, that they have an interest in righting a wrong which the local union officers inflicted on them and other members of Local 7326. Plaintiffs argue that USW has no interest in stopping wrongdoing of local union officers and that its actions from the time of plaintiffs' original demand for an investigation to the present has been protective of the local officers. Plaintiffs argue that un-

less they are allowed to prosecute this action, any effort by USW will be feeble at best and will strangle in bureaucratic inertia and dilatory "buck-passing." Hopefully, USW will recognize its interest in pursuing wrongdoing where it occurs on the part of Local officers. The interest of USW in taking strong action to halt the misappropriation of funds provided by it to strikebound Locals would seem obvious.

This Court, however, recognizes the possibility that USW may be less than vigorous in pursuing this matter. However, the issue remains as to whether plaintiffs meet the third condition precedent to suit under 29 U.S.C. § 501(b); i.e., that they be Union members. This Court on re-consideration holds that they do not, and therefore, withdraws its leave to file this action granted herein on May 1, 1980.

Plaintiffs rely on *Phillips v. Osborne*, 403 F.2d 826 (9th Cir. 1968) in support of the proposition that they meet the requirement of union membership imposed by the statute. In *Phillips*, *supra*, the erstwhile plaintiff was a union member at the time he brought suit according to the Constitution and By-Laws of the Union. The court nevertheless held that he could not bring the suit because he had also joined a rival labor organization and his interest at the time he filed suit was actually antagonistic to the union for which he sought to bring the action, and for purposes of § 501(b), he was not an appropriate person to bring an action for the benefit of the Union.

Plaintiffs' attorney points out that no such antagonistic interest prevails with the instant plaintiffs. They are not members of a rival union. But unlike the plaintiff who was disqualified in *Phillips*, the instant plaintiffs were not members of USW when suit was filed.

In *Phillips*, *supra*, the court pointed out that § 501(b) gives the union members a right akin to the right of shareholders in a shareholder derivative suit. The Court stated:

> The condition of membership, which is expressly required by the Section, seeks to insure that a representative of the union, the real party in interest, will properly represent the union's interests in the litigation. *Phillips*, *supra*, at 832.

The plaintiffs in the instant suit, therefore, may be viewed as in the same position as a plaintiff who seeks to bring a shareholder derivative suit after he has sold his stock in the corporation. He may have owned his stock at the time of the alleged wrong, and he may have been derivatively injured by such wrong, but essential to his being allowed to bring the shareholder suit for the benefit of the corporation is that he be a shareholder at the time of filing suit. 7A C. Wright & A. Miller, *Federal Practice and Procedure*, 325 (1972); 19 Am.Jur. 2d, *Corporations*, § 559. A complete victory in this case by the plaintiffs will be of no tangible benefit to the plaintiffs since they are not members, and a recovery for the USW will not be to their benefit, derivatively or otherwise. Conversely, a loss of this case will in no way be of any tangible detriment to them, derivatively or otherwise.

In *Schilling v. Belcher*, 582 F.2d 995, (5th Cir. 1978), the court considered the standing of a former stockholder to bring an action on behalf of the corporation. At page 999, the *Schilling* court stated:

> Fed.R.Civ.P. 23.1 contains two discrete standing requirements: (1) the plaintiff must have owned stock in the defendant corporation at the time of the transaction of which he complains, the so-called "contemporaneous ownership" requirement, and (2) the plaintiff must be a shareholder of the defendant corporation at the time suit is brought. The latter requirement, unlike the contemporaneous ownership rule, is not expressly stated in the rule, but rather is implied by the statement that an action under Rule 23.1 may be "brought by one or more share-

holders . . . to enforce a right of a corporation." Only a shareholder, by virtue of his "proprietary interest in the corporate enterprise," *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 321 56 S.Ct. 466, 471, 80 L.Ed. 688 (1936), may "step into the corporation's shoes and . . . seek in its right the restitution he could not demand in his own." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 548, 69 S.Ct. 1221, 1226, 93 L.Ed. 1528 (1949). Thus, it is generally held that the ownership requirement continues throughout the life of the suit and that the action will abate if the plaintiff ceases to be a shareholder before the litigation ends. C. Wright & A. Miller, 7A Federal Practice and Procedure § 1826, at 325 (1972); see *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976); *Niess v. Gorsuch*, 295 F.2d 909 (9th Cir. 1961); 3B Moore's Federal Practice ¶ 23.1.17, at 23.1-63 (2d ed. 1978); see also Annot., 168 A.L.R. 906 (1947).

The *Schilling* court also quoted from *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-736 (3rd Cir. 1970) as follows:

> Standing [to bring a derivative action in behalf of a corporation] is justified only by [the] proprietary interest created by the stockholder relationship and the possible indirect benefits the nominal plaintiff may acquire *qua* stockholder of the corporation which is the real party in interest.

Plaintiffs also rely on *Axelrod v. Stoltz*, 264 F.Supp. 536 (E.D.Pa. 1967). In *Axelrod*, *supra*, the party seeking to bring the suit was suspended from union membership, and the union contended that it had to take formal action to reinstate the party before he was a "member" within the meaning of § 501(b). The court in *Axelrod* held that Axelrod became a "member" of the union when his period of suspension expired even though

the union had not taken any affirmative action to reinstate.

As the *Axelrod* court stated:

> When Axelrod's period of suspension ended, there was no requirement for any proceedings looking to reinstatement. When he tendered dues after the expiration of the suspension period, he had done all that was necessary to the restoration of his benefits and privileges as a union member. The rejection of the tender of dues was improper. *Axelrod v. Stoltz, supra*, at 540.

Thus, the *Axelrod* court recognized the requirement of § 501(b) that in order to maintain the action the plaintiff had to be a member of the union, and it expressly found such membership existed.

Plaintiffs argue that their lack of union membership is through no fault of theirs, but results from the fact that their local union ceased to function. This is obviously true, but this does not give them the standing of "membership" which is required to bring this action. To paraphrase the language of *Schilling, supra*, at p. 1002, "a close reading" of § 501(b) persuades us that Congress "has not chosen to entrust the heavy responsibility of vindicating unenforced" union "rights to a representative who is no longer a member of the class which will benefit or suffer from his actions." Accordingly, it is

ORDERED that leave to file the complaint herein granted on May 1, 1980, be, and is hereby, WITHDRAWN.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA NORTHERN DIVISION

Civil Action No. 80-180-N

ELBERT ERKINS, and SAMUEL DENSON, and PERRY CULPEPPER

Plaintiffs

vs.

BILLY BRYAN, and ARTHUR COMER, and GEORGE BULLARD, and CHARLIE GREENE

Defendants

[Filed July 21, 1980]

ORDER

This cause is before the Court on plaintiffs' motion for reconsideration filed herein on July 14, 1980. In their motion plaintiffs now state that they do not concede that they were not members of Local 7326 when the complaint was filed. Plaintiffs argue that because the closing audit has not occurred under administratorship, the local union has not been dissolved. Based on this fact, plaintiffs now make the assertion that they are still members of the union for the purpose of construing 29 U.S.C. § 501(b).

The argument presented to this Court orally by plaintiffs' counsel on June 20, 1980, and the documents on file in this cause simply do not support plaintiffs' present assertion of present membership in the local union.

From the argument reported stenographically and transcribed in part at the Court's request, plaintiffs' counsel again and again acknowledged that plaintiffs

were not members of the union at the time the complaint was filed. Counsel contended that Title 29, § 501(b) was met if plaintiffs were loyal union members at the time the union was decertified. For example:

> MR. JACOBSON: If Your Honor please, as I recall, when we met in the Court's chambers, I recall distinctly indicating to the Court, and the complaint so indicates, that Mr. Erkins and Mr. Denson and Mr. Culpepper were members of the union at the relevant—what we allege is the relevant period of time, which was up to the time the union was decertified, and that we did indicate to the Court that the union local was no longer in existence, because the strike had been lost and that the local had been decertified, and I do apologize to the Court if I gave the Court the impression they were members at the time of the complaint.

And later:

> MR. JACOBSON: Now, on the issue of membership, which bothers the Court, because clearly they were not members at the time. . .

And later:

> MR. JACOBSON: A common sense reading of what membership has got to mean in this situation, it's got to mean that as far as the strike which ends up in decertification. It is the members in good standing during the strike up to the point of decertification, and none of these plaintiffs, Your Honor, crossed that picket line.

Thus, plaintiffs' counsel conceded that plaintiffs were not union members when suit was filed and argued forcefully that this fact was irrelevant in light of the plaintiffs' undisputed membership when the alleged improprieties occurred.

As stated in this Court's order entered herein on June 30, 1980, vacating leave to file suit granted on May 1, 1980:

> Following the loss of the election, Local 7326 had no bargaining representative status, and in July, 1978, an administrator was appointed to conclude the affairs of Local 7326. The Local was dormant for some eighteen months or more prior to the filing of the instant suit. No dues have been received nor have any meetings been held. In short, no activities of any kind have occurred since at least October, 1978, in connection with USW Local 7326.

The union is in a caretaker status until it is accounted for and dissolved, but the fact that this process has not concluded is insufficient to support plaintiff's newly-found assertion of present union membership nor does that fact have any effect on this Court's determination that plaintiffs lack standing to sue under 29 U.S.C. § 501(b).

Plaintiffs' counsel argued vigorously at the hearing that these plaintiffs were not to blame because they were no longer union members. Plaintiffs' counsel insisted that plaintiffs had been loyal members throughout the strike and were loyal members when the alleged wrongs took place. These facts are not in dispute, but they do not give "standing."

The basis for the Court's withdrawal of its right to file the complaint was based upon the plaintiffs' lack of any derivative interest in the outcome of the lawsuit. Any derivative interest these plaintiffs might have had in the outcome of this lawsuit was extinguished on the decertification of the union and the absence of any activity by the union or by these plaintiffs as union members for eighteen months prior to the filing of this suit. The outcome of plaintiffs' claim in this suit would in no way benefit plaintiffs, whether the process of

liquidating the union has been concluded or not. The mere fact that this defunct union has not been liquidated cannot give these plaintiffs a derivative interest in the outcome of the lawsuit. In the opinion of this Court, these plaintiffs are not proper representatives to bring a suit for the benefit of the union. Membership in the union is a clear requirement by Congress when it bestowed the right of action in 29 U.S.C. § 501(b).

Accordingly, it is ORDERED that plaintiff's motion for reconsideration be, and it is hereby, denied.

DONE this 21st day of July, 1980.

/s/ Truman Hobbs
United States District Judge

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. A-1051

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

ROBERT ERKINS, ET AL.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including July 17, 1982.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 4th day of June, 1982.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. A-1051

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner

v.

ROBERT ERKINS, ET AL.

ORDER FURTHER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, further extended to and including August 16, 1982.

/s/ Byron R. White
Associate Justice of the Supreme
Court of the United States

Dated this 9th day of July, 1982.

Office - Supreme Court, U.S.
FILED
SEP 7 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

BRIEF OF RESPONDENTS BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD AND CHARLIE GREENE IN SUPPORT OF THE PETITION

JEROME A. COOPER
Counsel of Record
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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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TABLE OF AUTHORITIES

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 82-270

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

BRIEF OF RESPONDENTS BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD AND CHARLIE GREENE IN SUPPORT OF THE PETITION

These respondents adopt and support petitioner's Statement of the Questions Presented; Authorities Cited; Reasons for Granting the Writ; Jurisdiction; and Statutory Provisions Involved.

SUPPLEMENTAL STATEMENT OF THE CASE

These respondents agree with and adopt petitioner's Statement of the Case and supplement same briefly. These respondents were members, and respondents Bryan, Comer and Greene were officers or representatives, of Local 7326, United Steelworkers of America, AFL-CIO-CLC. That Local engaged in a lawful strike at American

Buildings Company (the Company) at Eufaula, Alabama, from December 8, 1976 to July 14, 1978.

This civil action under the Labor Management Reporting and Disclosure Act of 1959, 29 U.S.C. §§ 401, *et seq.* (the Act), was brought against these respondents on May 1, 1980, in the United States District Court for the Middle District of Alabama. Also, these respondents were indicted on November 3, 1981, in Docket No. 81-83-N, in that same district court for alleged criminal violations of the Act.

The criminal indictment was based upon substantially the same unfounded and unsupportable allegations of misuse of strike funds as appear in this civil suit. One count also included an allegation of the filing of a false Labor Organization Annual Report Form LM-2.

The indictment charged in summary:

Count I—Billy Ray Bryan—as an officer, embezzlement and conversion of funds of the Local;

Count II—Billy Ray Bryan—as an officer, filing a false Labor Organization Annual Report Form LM-2;

Count III—Arthur Comer—as an officer, embezzlement and conversion of funds of the Local;

Count IV—Charlie Greene—as an officer, embezzlement and conversion of funds of the Local;

Count V—George D. Bullard—as an employee of the Local, embezzlement and conversion of funds of the Local.

At trial of the criminal cases to a jury, the Court dismissed Counts II and V of the indictment after hearing the evidence. The jury returned verdicts of not guilty on all remaining counts. The judgments which were entered in the criminal cases are attached hereto as Appendices A, B, C and D.

The decision below was incorrect, as Petitioner has set forth. These respondents are the innocent victims of that error.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

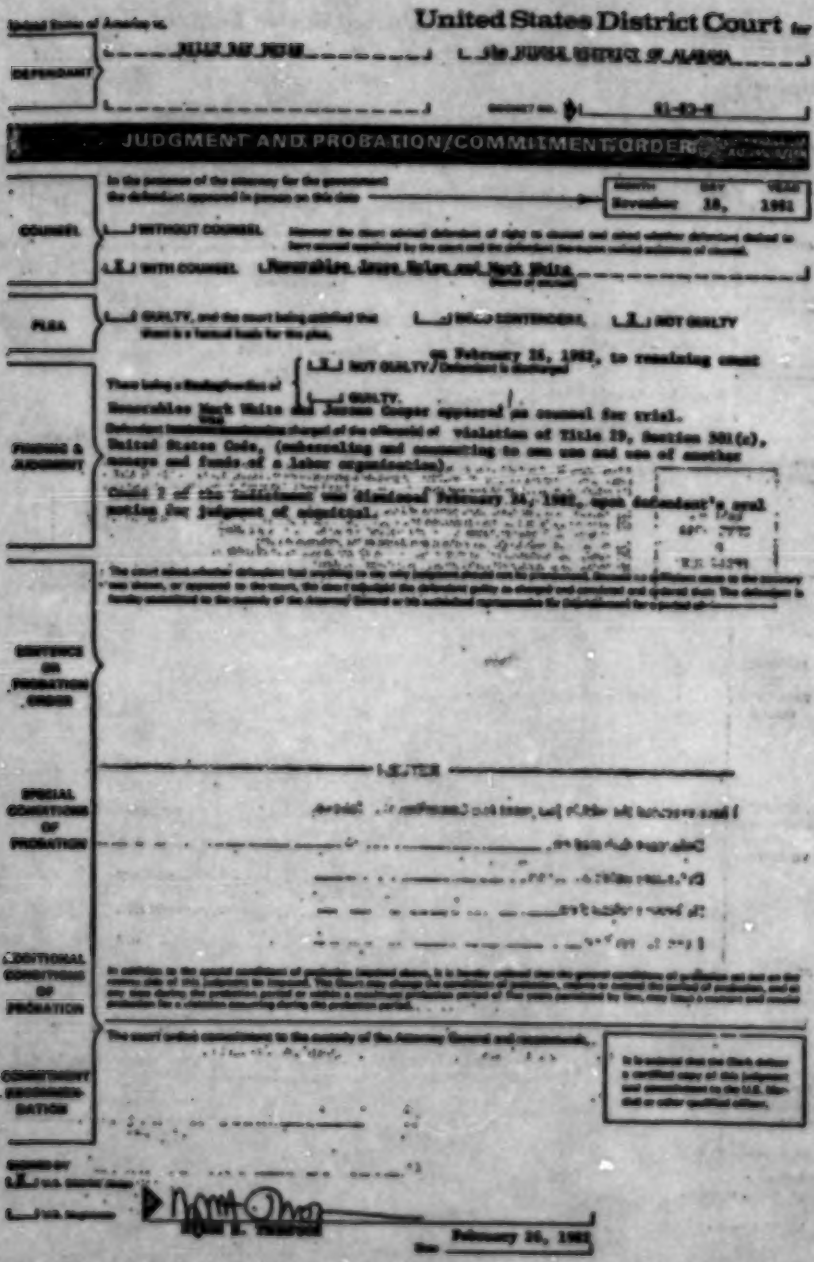
Respectfully submitted,

JEROME A. COOPER
Counsel of Record
COOPER, MITCH & CRAWFORD
409 North 21st Street
Birmingham, Alabama 35203
(205) 328-9576

Attorneys for Respondents, Billy Bryan, Arthur Comer, George Bullard and Charlie Greene

APPENDICES

APPENDIX A



United States District Court for

DEFENDANT

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date — November 18, 1981

WITH COUNSEL — Honorable James Hare and Mark White

PLEA

FINDING & JUDGMENT

On February 26, 1982, to remaining count

Honorable Mark White and James Cooper appeared as counsel for trial.

violation of Title 29, Section 501(c), United States Code, (embezzling and converting to own use and use of another moneys and funds of a labor organization).

Count 2 of the indictment was dismissed February 26, 1982, upon defendant's oral motion for judgment of acquittal.

SENTENCE OR PROBATION ORDER

SPECIAL CONDITIONS OF PROBATION

ADDITIONAL CONDITIONS OF PROBATION

COMMITMENT RECOMMENDATION

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

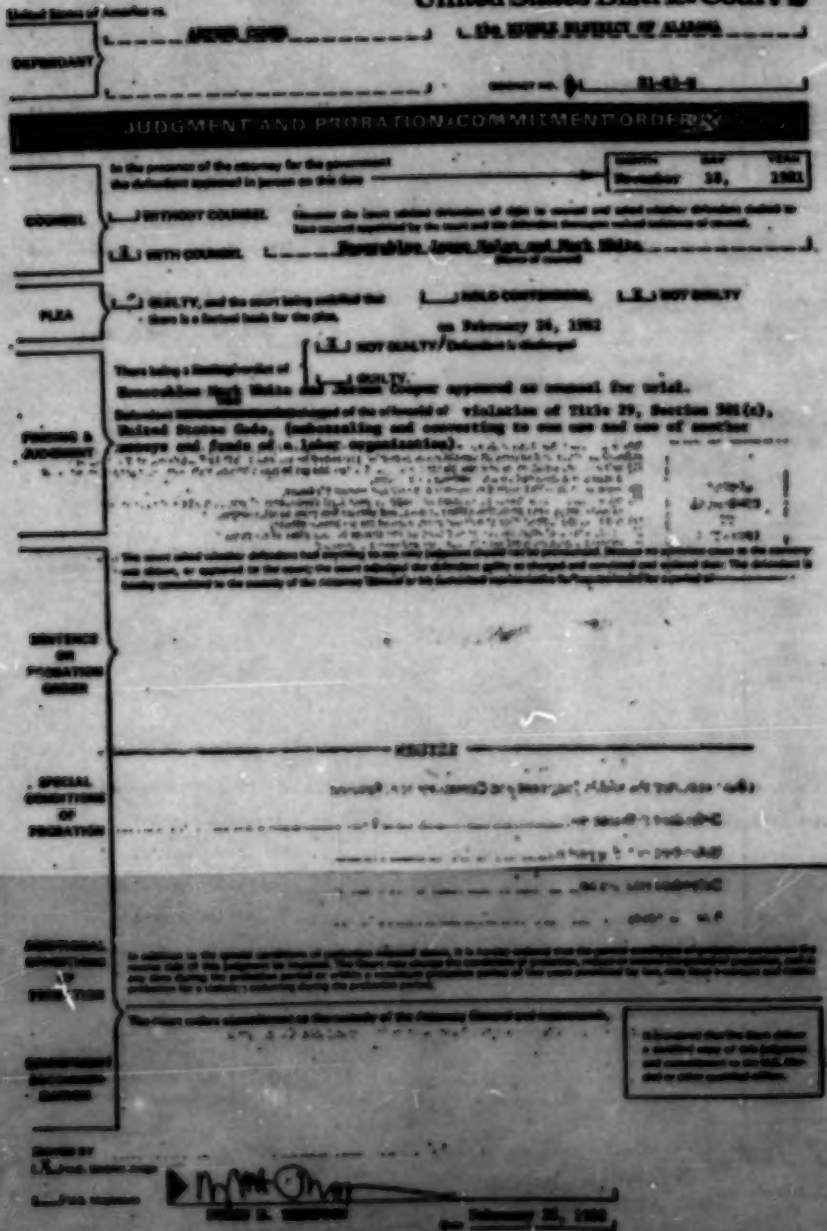
U.S. District Judge

U.S. Magistrate

Hugh S. Thompson

February 26, 1982

APPENDIX B



United States District Court

JUDGMENT AND PROBATION/COMMITMENT ORDER

November 18, 1981

Honorable Jesse Tolin and Mark Wilkie

on February 26, 1982

Honorable Mark Wilkie

violation of Title 29, Section 501(c), United States Code, (embezzling and converting to own use and use of another moneys and funds of a labor organization).

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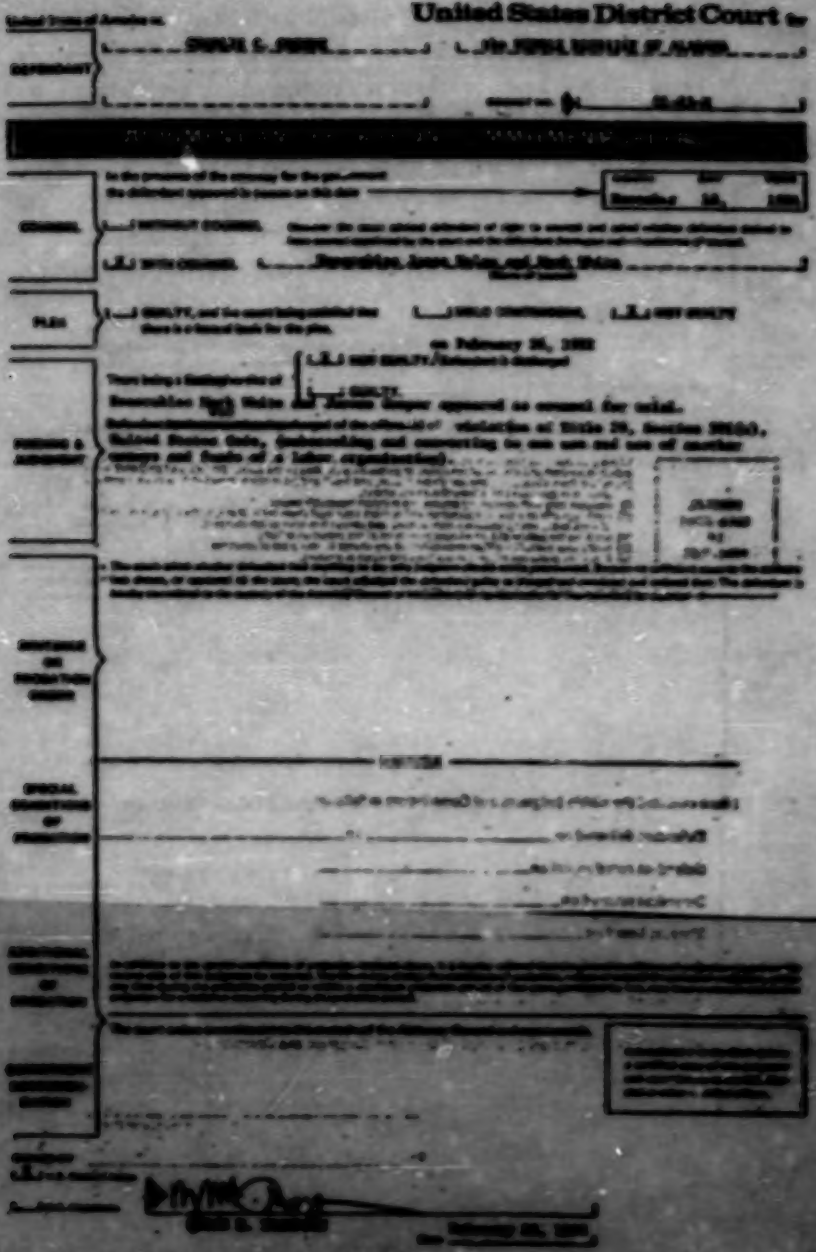
APPENDIX C



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APPENDIX D

United States District Court

...ited States of America vs. GEORGE P. WALLACE ... DEFENDANT

... THE MIDDLE DISTRICT OF ALABAMA ... DOCKET NO. 81-83-N

JUDGMENT AND PROBATION/COMMITMENT ORDER

COUNSEL

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH: November, DAY: , YEAR: 1981

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL [illegible] Jones, Esq. and Hon. Mark White (Name of counsel)

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea. [ ] NOLO CONTENDERE. [X] NOT GUILTY on February 26, 1982. Defendant's motion for judgment of acquittal granted.

FINDING & JUDGMENT

There being a finding/verdict of [X] NOT GUILTY/ Defendant is discharged [ ] GUILTY.

Honorable C. Burton Dunn appeared as counsel for trial.

Defendant has been convicted as charged of the offense(s) of violation of Title 29, Section 501(c), United States Code, (embezzling and converting to own use and use of another moneys and funds of a labor organization).

[illegible]

SENTENCE OR PROBATION ORDER

[illegible]

SPECIAL CONDITIONS OF PROBATION

[illegible]

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends [illegible]

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

[X] U.S. District Judge

[ ] U.S. Magistrate

[illegible]

ROBERT E. THOMPSON

DATE: February 26, 1982

Best Copy Available

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS
CLERK

No. 82-270

In the Supreme Court of the United States

October Term, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Non-Party "Petitioner",

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,

Co-Petitioners-"Respondents",

vs.

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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COUNTER-STATEMENT OF THE ONLY QUESTION PRESENTED

Whether a writ of certiorari should be granted to review a Court of Appeals' decision that the "union membership" and "good cause" prerequisites for suit under §501(b) of the Landrum-Griffin Act are satisfied by a variety of factual variables indicating both membership status and good cause to proceed as of the time of commencement of the §501(b) suit, where the Court of Appeals' decision presents no issues of public importance to the administration of the federal courts or the Nation's unions, no inter-circuit conflicts, and no final holding on the as yet untried facts of the case?

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No. 82-270

In the Supreme Court of the United States

October Term, 1982

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,

Non-Party "Petitioner",

BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,

Co-Petitioners-"Respondents",

vs.

ELBERT ERKINS, SAMUEL DENSON, and PERRY CULPEPPER,

Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The respondents Elbert Erkins, Samuel Denson, and Perry Culpepper oppose the petitioners' request for the issuance of a writ of certiorari in this case. The Court will notice that the respondents have re-captioned and re-alligned the parties in this case, because it is duplicitous of the United Steelworkers of America to caption themselves as the petitioner, without indicating to the Court their non-party status; and, it is equally duplicitous to allign and caption the losing defendants below, Billy Bryan, Arthur Comer, George Bullard, and Charlie Greene as respondents, when in fact they are parties in

interest opposed below, antagonistic to the outcome below, and supportive of the petition before this Court.

The respondents Elbert Erkins, Samuel Denson, and Perry Culpepper adopt the non-party petitioner's and the respondents' statements of the Opinions Below, Jurisdiction, and Statutes Involved.

COUNTER-STATEMENT OF THE CASE

The statement of the case presented by the United Steelworkers of America is factually misleading and based upon a number of facts which are in dispute on the record in this case. Footnote one (1) at page three (3) of the petition is incorrect The supplemental statement of the case by the petitioners-"respondents" Bryan, Comer, Bullard, and Greene presents matter completely outside the record and irrelevant to the question of whether or not a writ of certiorari should be granted.

Respondents Erkins, Denson, and Culpepper adopt the factual statement of the opinion of the Eleventh Circuit Court of Appeals as the statement of the case and supplement it as follows. In the United States District Court for the Middle District of Alabama the respondents Erkins, Denson, and Culpepper were plaintiffs, and the respondents Bryan, Comer, Bullard, and Greene were defendants. The plaintiffs, who were local union members, claimed that the defendants, who were local union officials, had misappropriated strike funds for their own personal use during a long and bitter strike between the local union and the employer of the employees who constituted the membership of the local union. Under §501 (b) of the Landrum-Griffin Act it is necessary to the commencement of a suit claiming that union officials have breached their fiduciary duties for the plaintiffs to

show to the Court, prior to the commencement of the suit, that they are union members, that they have made an attempt to get the union to redress the alleged fiduciary breach, that the attempt has not resulted in the initiation of corrective litigation by the union, and that there is "good cause" to proceed in the case. These prerequisites were initially met in this suit by the plaintiffs. Then, the Steelworkers attempted to intervene and persuade the trial court that it should not have issued and should thus rescind leave to proceed to the plaintiffs. The trial court did *not* grant the Steelworkers leave to intervene but did decide on its own motion to rescind its prior issuance of leave to proceed. Thereafter, the trial court denied reconsideration of that rescission decision to the plaintiffs.

Plaintiffs appealed to the Eleventh Circuit Court of Appeals. The Steelworkers did not seek intervention before the Eleventh Circuit Court of Appeals. That court reversed the trial court's decision and remanded the case with leave to proceed to the plaintiffs.

Thus, as this case comes to this Court, the Steelworkers are not actually a party to this litigation, and the so-called "respondents" Bryan, Comer, Bullard, and Greene are actually parties petitioners in this Court. Because there has been obvious coordination between counsel for Bryan, Comer, Bullard, and Greene and counsel for the Steelworkers[1] in this litigation, this Court can fairly conclude that the captioning and allignment of the parties constitutes a conscious attempt to deceive the Court and to create the false appearance that both a petitioner and

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[1] Indeed, in both the trial court and the appellate court plaintiffs sought to disqualify respondents' counsel for the conflict between their individual representation and prior representation of the local union.

some seemingly adversarial respondents join in this proposition that the writ of certiorari should be granted.

Respecting the crucial issue of the membership status of Erkins, Denson, and Culpepper at the time of the commencement of the action, in addition to the facts set forth in the opinion of the Court of Appeals, the following *undisputed* facts should be noted. Erkins, Denson, and Culpepper were members in good standing of both the Steelworkers and the local throughout the duration of the strike between December, 1976 and July, 1978. Decertification of a local union as bargaining representative has no effect at all upon the continued existence of the local union; it means only that certified bargaining representatives status from the government is lost. When the union was decertified the Steelworkers put the local under the control of an administrator for purposes of "winding up" its affairs, presumably because it was a single-bargaining unit local union. The local union, however, has never finally been wound up, and its existence and chartering are still in effect. Neither Erkins, nor Denson, nor Culpepper has ever voluntarily withdrawn from the union's membership nor been suspended nor expelled from the union's membership. Each remains fully within the Steelworker's constitutional definition of eligibility for membership. There has been no termination of the union either pursuant to the procedures established under the Landrum-Griffin Act with the United States Department of Labor or pursuant to internal union procedures with the Steelworkers. Indeed, the local union treasury reflects a continuing balance of approximately $2,000.00, and the continued existence of bank accounts from which the misappropriations occurred. While it is true that Erkins, Denson, and Culpepper have not paid union dues since October, 1978, that fact stated alone is

misleading, because Erkins, Denson, and Culpepper have not been obligated to pay dues, by virtue of the application of the out-of-work waiver of dues provisions of the Steelworkers' constitution. Moreover, Erkins, Denson and Culpepper as employees retain recall rights with the employer, as well as transfer rights within the union. Thus, should they be recalled, or should they obtain employment with another employer that recognizes a local union affiliated with the Steelworkers, then their active dues' obligation would immediately, without more, recur. It is on the basis of all of these facts, together with the facts stated in its opinion, that the Eleventh Circuit Court of Appeals concluded that Erkins, Denson, and Culpepper made a sufficient showing of local union membership at the time of the initiation of the §501(b) suit to warrant the issuance of leave to proceed.[2]

The petition also misrepresents the facts respecting the decisions of both the trial court and the Court of Appeals that Erkins, Denson, and Culpepper had sufficiently demonstrated their attempts to persuade the union to initiate corrective litigation and good cause for viola-

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[2] The Court of Appeals also applied the standards of *Horner v. Ferron*, 362 F.2d 224 (9th Cir. 1966) to conclude that disputed facts material to an issue of whether the §501(b) prerequisites had been met were sufficient to satisfy leave to proceed requirements and take the dispute to trial. The application of that standard reveals numerous inferences that presently could be drawn on the issue of "membership". An ongoing boycott of the employer could be successful, thereby eventuating a revival of the local union; the local is inactive since decertification but is available for reactivation due to organizing efforts at the employer or elsewhere; both strike funds and local union passback funds continue to exist in local union accounts currently under the administrator's control; the local union still has obligations, not yet paid, and financial affairs not yet wound-up; some members of the local have been recalled to work at the employer, and the local could be reactivated.

tion to warrant the issuance of leave to proceed. Steelworkers would have this Court believe that it was motivated by cost-benefit concerns and proper administrative referral attitudes towards the United States Department of Labor in its decision not to proceed to litigate the misappropriations. The fact is that Steelworkers used its internal audit procedures and the referral to the United States Department of Labor as a mechanism for denying full access to the facts to Erkins, Denson, and Culpepper and their counsel and as a further means for denying full adversarial discovery and trial litigation of the embarrassing facts of the misappropriations and of the subsequent participation of Steelworker officials in "stonewalling" the true facts. To this day there has been no full adversarial hearing of the actual facts of the misappropriation.[3]

REASONS FOR NOT GRANTING THE WRIT

On the basis of the foregoing Statement of the Case, the seeming abstract importance of the issues presented by the Steelworkers' petition is belied. On the basis of the full and actual facts of the case, the "membership" and "good cause" questions become ordinary §501(b) procedural questions based on facts that have not yet been tried; and the "Article III standing" question disappears.

However, before we discuss these legal matters, we first consider the insignificance of the issues presented in light of the actual facts of record. The petition has

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[3] In the criminal litigation against Bryan, Comer, Bullard, and Greene, remarked in their brief, Steelworker officials, including accounting and audit officials, appeared as witnesses for Bryan, Comer, Bullard, and Greene, thereby virtually assuring their acquittal.

ex cathedra opined that the definition of membership in this case substantially burdens all unions as well as the case load of the federal courts. Neither proposition is true. The constitutional definitions of eligibility for membership and limitations upon membership in various unions affiliated with the AFL-CIO are as varied as are the politics and identities of the unions so affiliated. The interplay between the statutory definition of membership under the Landrum-Griffin Act and the constitutional membership provisions of various unions will always differ from case to case depending upon the facts of each case, the constitutional provisions involved, the substantive Landrum-Griffin rights being asserted, and the membership provisions of the Act. It is to construct a strawman for the Steelworkers to contend that the highly factual construction of "membership" in the instant case constitutes a *per-se* rule respecting all membership in all unions for all purposes. Moreover, in order to construct the strawman, the Steelworkers have also assumed that full statutory "due process" provisions must be applied in order administratively, as an intra-union matter, to accomplish a suspension or termination of membership for non-disciplinary reasons such as final termination of local union existence and bargaining status. No case so holds. For these reasons, the Steelworkers' contentions respecting the practical impact of the decision below upon the administration of labor unions are illusory.

The Steelworkers' petition also contends that the "membership" determination below will greatly burden the federal district courts in their statutory obligations respecting the fiduciary duties of union officials. However, the balance struck by Congress respecting the tension between union members' access to the federal courts and union officials' duties to be honest is a balance that under

§501(b) vests substantial discretion in federal district court judges as to whether or not to grant leave to proceed. Indeed, the door to federal court is more closely guarded by §501(b) than it is in any other ordinary kind of federal district court civil litigation. Thus, there is no undue burden upon the federal courts by virtue of the decisions of either the Eleventh Circuit or the trial court.

The Steelworkers' petition argues for a certain construction of the membership definitional provisions of the Landrum-Griffin Act, so that fulfillment of the requirements for membership in a labor organization is a functional category based on intra-union constitutional membership status at the time of commencement of the litigation. On the basis of the actual facts of record in this case, whether any court prefers the Steelworkers' construction of the Act is irrelevant, because Erkins, Denson, and Culpepper have satisfied even the Steelworkers' requirements for membership. To phrase it differently, the court below did *not* premise its decision on a purely temporal reading of the statute but rather upon all of the factual variables demonstrating membership on this record. Indeed, the reason that this case is actually a mine-run case respecting the statutory meaning of "membership" is because virtually every federal court that has considered "membership" has followed the approach of examining all factual and union constitutional variables respecting membership and then deciding each case on its own particular facts. See, e.g., *Alvey* vs. *General Electric Company*, 622 F.2d 1279 (7th Cir. 1980); *Hughes* v. *Local Eleven International Association of Bridge Workers*, 287 F.2d 810 (3rd Cir. 1960); *Basilicato* v. *International Alliance*, 479 F.Supp. 1232 (Dist. Conn. 1979); *Axelrod* v. *Stoltz*, 264 F.Supp. 536 (E.D. Pa. 1967).

On the question of "good cause", the actual state of the record indicates that the district court made a "good cause" determination upon the basis of the sworn statements before it, as well as supporting evidence, declined to reconsider that determination, and was upheld by the Court of Appeals. The Steelworkers have consistently taken the view that, because the §501(b) procedure is designed to benefit the union by returning funds to it, "good cause" should not be found where the supposed benefit is resisted by the union. This argument confounds the very nature of derivative enforcement litigation. If the Steelworkers had initiated litigation to obtain damages or an accounting for the misappropriations in question, then there would be no basis for the §501(b) leave to proceed suit. However, Congress has determined, and the courts below concur, that where the union resists the request for damages or an accounting, and where there is good cause to proceed, then the derivative litigation may be commenced. Good cause here was satisfactorily demonstrated on the facts presented in the opinion of both the district court and the Court of Appeals. Thus, the "good cause" aspect of the Court of Appeals' opinion also presents only a mine-run decision, as to which virtually all the lower federal courts concur. *Dinko v. Wall,* 53 F.2d 68 (2nd Cir. 1976); *Purcell v. Keane,* 406 F.2d 1195 (3rd Cir. 1969); *Horner v. Ferron,* 362 F.2d 224 (9th Cir. 1966); *Brink v. Da Lesio,* 453 F.Supp. 272 (M.D. Md. 1978); *Pawlak v. Greenawalt,* 464 F.Supp. 1265 (M.D. Pa. 1979). Whether the lower courts in this case abused their discretion in concluding "good cause" is a question which this court does not ordinarily review. This is especially so where the facts upon which the good cause determination are based have not yet matured or been tested by the full adversarial process at the trial

court level or refined by appellate litigation on a fully developed record before reaching this Court.

The decision below is not inconsistent in principal with the decision of the Third Circuit in *Purcell v. Keane*, 406 F.2d 1195 (3rd Cir. 1969), because that court considered all factors in determining "good cause" precisely as did both the district court and the Court of Appeals in the instant case.[4]

Finally, no inter-Circuit conflict is presented by either of the issues raised by the Steelworkers' petition. Indeed, the entire fabric of the case law in the lower federal courts is harmonious with the decision of the Eleventh Circuit.

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[4] The so-called Article III issue of standing is obviated by the facts respecting membership. Obviously, a member who is such at the time of suit possesses the requisite personal stake *as a member* because the remedy sought benefits him *as a member* by restoring the misappropriated funds to the treasury of the union of which he is a member. That he receives no money personally is irrelevant. *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940); *United States v. SCRAP*, 412 U.S. 669 (1973).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 82-270

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OCTOBER TERM, 1981

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ELBERT ERKINS, SAMUEL DENSON, PERRY CULPEPPER, BILLY BRYAN, ARTHUR COMER, GEORGE BULLARD, and CHARLIE GREENE,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner United Steelworkers of America, AFL-CIO-CLC ("USWA") submits this Reply Memorandum in response to the Brief in Opposition of Respondents Erkins, Denson and Culpepper (hereinafter "Respondents").[1]

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[1] As indicated in our petition, there are two sets of respondents in this case: Elbert Erkins, et al., plaintiffs below, who oppose the petition for certiorari; and Billy Bryan, et al., defendants below, who support the petition. This reply brief is submitted in response to the former group of respondents; for convenience we refer to them simply as "respondents."

Although respondents assert that it was "duplicitous" of USWA to name the individuals who were defendants below as respondents, USWA did so pursuant to Rule 19.6 of the Rules of this Court which states in pertinent part:

> All parties to the proceeding in the court whose judgment is sought to be reviewed shall be deemed parties in this Court,

1. Respondents go to great lengths (Br. at 1-4) in their Brief to argue that USWA is "not actually a party to this litigation" and hence not a proper petitioner. Respondents are wrong.

As respondents concede (Br. at 3), after the district court granted respondents' *ex parte* motion for leave to file this action, USWA moved to intervene in the district court for the limited purpose of seeking reconsideration of the district court's decision to entertain this action. In that motion, USWA raised the very issues that are raised herein, *viz.* the meaning of the term "member" and the phrase "good cause" in the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"). USWA did so because of it had a substantial stake in securing the prompt dismissal of this lawsuit: as explained in the petition (p. 14), this lawsuit threatened to expose USWA to expenses which were unnecessary to achieving the purposes for which § 501 was enacted.

The district court recognized USWA's interest in this regard, and in the first sentence of the first footnote of the opinion that the district court issued in response to USWA's motion for reconsideration, the district court stated, "USW[A] was granted the right to be heard on its plea for reconsideration" (Pet. App. 15a). The district court went on to address and reject respondents' argument that intervention was not proper because USWA

> unless the petitioner shall notify the Clerk of this Court in writing of petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. . . . *All parties other than petitioners shall be respondents*, but any respondent who supports the position of a petitioner shall meet the time schedule for filing papers which is provided for that petitioner, except that any response by such respondent to the petition shall be filed within 20 days after receipt of the petition.

Under that rule, of course, it is not uncommon to find parties named as respondents who were aligned with the petitioner in the lower courts and who support the granting of a writ of certiorari.

was not asserting a claim or a defense, ultimately concluding that "the Court is of the opinion that USW[A] has a right to ask for such reconsideration" (*id.*).

In accordance with the decision of the district court, on the appeal of this case to the Eleventh Circuit USWA was treated as an intervenor-appellee both by respondents and by the court of appeals. In papers they filed in the court of appeals, respondents repeatedly referred to USWA as "[i]ntervenor-appellee, United Steelworkers of America."[2] USWA filed a brief as a party and presented oral argument as a party. And in the caption of its initial opinion (Pet. App. 1a), and of its opinion on rehearing (*id.*, 13a), the court of appeals listed USWA as "Intervenor-Appellee." Thus, respondents' claim that USWA was not a party below and hence is not a proper petitioner in this Court is without merit.

2. With respect to each of the questions of statutory interpretation raised in our petition, respondents contend that the question we raise is not presented by the decision below. According to respondents, the court of appeals did not ascribe any general meaning to the pertinent provisions of the LMRDA, but rather made *ad hoc* determinations—turning exclusively upon the facts of this case—that respondents were "members" and that "good cause" existed for entertaining this action. Thus, respondents contend that the court of appeals based its determination of "membership" "upon all of the factual variables demonstrating membership on this record" (Br. at 8) and that the appellate court likewise found "good cause" for entertaining this action by "consider[ing] all factors" (Br. at 10).

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[2] In their opening brief in the court of appeals, respondents listed USWA in the caption of the case as "Intervenor-Appellee." Respondents did likewise in their Reply Brief. And on two occasions in the court of appeals, when USWA moved to supplement the record, respondents filed memoranda in opposition which repeatedly referred to USWA as "intervenor-appellee."

Significantly, in making these claims respondents do not even cite to—let alone quote from—the decision of the court of appeals. Respondents' omission is understandable, for the opinion below unmistakably rests on interpretations of the statutory provisions—interpretations which, as we showed in our petition, have broad-reaching significance and which are inconsistent with the language, history, and purposes of the Act.

In determining that respondents were "members" within the meaning of § 3(o) of the Act, the court of appeals reasoned as follows:

> [I]t is appropriate when considering the meaning of the words in § 501(b) to look at the definition section of Chapter 11, of which this section is a part.
>
> • • • •
>
> The effect to be given to this definition has been ably described by the Court of Appeals for the Seventh Circuit:
>
> • • • •
>
> > [U]nder section 402(o), one who has met the membership requirements remains a member within the meaning of the Act until one of two events occur: (1) the member voluntarily withdraws from the union or (2) the union expels or suspends the member after "appropriate proceedings" held pursuant to lawful constitutional or bylaw provisions. *See Brennan v. Independent Life Truck Builders Union*, 490 F.2d 213, 217 & n.6 (7th Cir. 1974). [Pet. App. 6a-7a]

Similarly, in finding "good cause" the court of appeals explained:

> The [USWA] . . . claims . . . that an ingredient in the trial court's decision granting such a petition [for leave to file a § 501(b) action] is that there must be a finding that there has been a showing of "good cause." The [USWA] contends that the way it handled the matter instead of filing suit as out-

> lined in the statute itself would have been more beneficial to the Union than to have acted as requested by the members. This, of course, cannot establish a want of good cause, because the language of the statute is clear and simple. The petitioners may act once they have notified the International and have requested that a suit be brought and there is a failure within a reasonable time to bring such suit. The trial court could not second guess the purpose of the statute by saying that some other precondition to the filing of a petition may take the place of the one laid down in the text of the section. [App. 9a-10a]

Thus, in both instances, the court of appeals made an interpretation of the statutory provision involved. The court interpreted the definition of "member" in § 3(o) temporally to mean that " 'one who has met the membership requirements remains a member within the meaning of the Act until one of two events [withdrawal or suspension after appropriate proceedings] occur." ' And the court interpreted the "good cause" requirement of § 501 (b) to be satisfied automatically if the plaintiffs "have requested that a suit be brought and there is a failure within a reasonable time to bring suit."

As we showed in our petition, each of these holdings warrants review by the Court: the "membership" holding because it erroneously confers "membership" status (with all the rights that entails) on persons who once were, but no longer are, within a union's jurisdiction but who have not formalistically withdrawn or been expelled; and the "good cause" holding because, by ruling irrelevant to the "good cause" determination a union's efforts to recoup diverted funds through means other than litigation, it opens the federal courts to unnecessary § 501(b) actions which will disserve the statutory purpose of full recovery by union treasuries of such funds.[8]

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[8] Respondents assert (Br. at 6) that USWA's decision here to turn respondents' allegations of wrongdoing over to the United States Department of Labor for investigation and for whatever

CONCLUSION

For the foregoing reasons, and those set forth in our Petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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action the Department deemed appropriate, and USWA's further decision to make a claim on its "Labor Organization Bond" if the Department found any misappropriation of funds were motivated by a desire to thwart discovery by respondents. The assertion is contrary to the undisputed record evidence. Carl Frankel, the Associate General Counsel of USWA, on whose recommendation this procedure was adopted by USWA, submitted an affidavit which explains at length the reason for USWA's decision in this case (and in two other like cases) to seek a DOL investigation; as explained in our Petition (at 7), USWA so decided in order to secure an impartial determination of whether wrongdoing had occurred and, if so, to enable USWA to recover its losses without the costs of litigation.

Respondents' further assertion (Mem. at 6 n.3) that in the criminal litigation against Bryan, et al., "Steelworkers officials, including accounting and audit officials, appeared as witnesses for Bryan . . . thereby virtually assuring their acquittal" is likewise false; at the criminal trial, only two USWA officials (Thomas Striegel, the assistant to the International Treasurer, and Therman Phillips, the District Director of District 36, the District which encompasses Alabama) testified, and both were called as witnesses for the *prosecution*. *See* Transcript of Trial in *U.S. v. Bryan*, No. CR-81-83-N, at 41, 66.